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No. 14-623

IN THE

Supreme Court of the United States

CPV MARYLAND, LLC,

Petitioner,

v.

PPL ENERGYPLUS, LLC, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONERS[1]

A. *Amicus* United States cannot reconcile the rulings below with the field preemption principles applicable under the Federal Power Act ("FPA") as set forth in the Court's decision in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015). In *Oneok*, this Court explained that "field preemption" poses no obstacle to the States' ability to target objectives and pursue responsibilities that Congress assigned to them. That state actions impact FERC-supervised interstate markets – as they invariably do when new capacity is added in the market – does not "field preempt" those actions. *Oneok*, 135 S. Ct. at 1600. State actions are field preempted only if they "aim" at the federal field, rather than at targets within the States' domain.

By subsidizing new power plant construction with long-term contracts and payments by ratepayers through the States' retail public utilities, Maryland and New Jersey "aimed" at matters squarely within their expressly-assigned FPA authority. The States' programs here (1) support new power plant construction (assigned to the States), by (2) directing state-regulated local utilities to make contractual payments (also assigned to the States), (3) supported, in turn, by retail rates (also a matter for the States). Even though the States' initiatives *affect* interstate markets and prices, they

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[1] Because the Petitions in Nos. 14-614 & 14-623 and 14-634 & 14-694 address cases from two circuits, the Clerk asked Petitioners to file two separately-captioned briefs.

are *aimed* at matters on the States' side of the FPA dividing line.

B. The government itself properly rejects the Third and Fourth Circuits' preemption holdings, namely, that state-supervised procurements that result in contracts providing payments different from prices for sales in the auction thereby "set rates." Absent review by this Court, those holdings will stand as circuit precedent, reflecting a basic misunderstanding about what it means for a government body to "set" a rate. Under the FPA, States routinely direct utilities to procure electricity or capacity under long- or short-term contracts. Although the resulting contracts include rates, it is not *the State*, but the competitive procurement, and winning bidder, that "sets" those rates. 14-623 Pet.-27-29; 14-623 Reply-3-5; 14-634 Pet.-24-27; 14-634 Reply-3-5.

C. The government's alternative approach – field preemption by "price suppression" – is equally inconsistent with the FPA, *Oneok*, and FERC's own views, and bears no relationship to the facts of these cases.

Even before *Oneok*, the Third Circuit rejected the government's theory as untenable and overbroad. "When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." 14-634 Pet. App.-29a (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 514 (1989)). The addition of any new supply reduces (or, to use the government's pejorative, "suppresses") prices. The "law" implicated by that fact is the "law of supply-and-

demand." *Id.* The government's theory is even less defensible *after Oneok*, which confirms that an effect on federal markets is not a basis for *field* preemption where States target responsibilities reserved to them by Congress. See *Oneok*, 135 S.Ct. at 1600.

Equally important, the government's allusions to market "distort[ion]" are diametrically opposite FERC's own determination, as regulator of those markets, that there was no distortion. The government's litigation-driven assertions cannot override the formally adopted, and fully-supported, view of the responsible federal agency.

As explained more fully *infra*, and in the Petitions, FERC rejected petitions to exclude these power plants from the capacity auction because it determined that their bids did not distort that auction or its resulting price signals. FERC squarely held that so long as their bids satisfied FERC's rigorous minimum offer price rules, those bids do "*not artificially suppress market prices.*" *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 at P 175 (2011). (emphasis added). In an Administrative Procedure Act review proceeding, the Third Circuit affirmed FERC's decision as "*prevent[ing] the state's choices from adversely affecting wholesale capacity rates.*" *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 98 (3d Cir. 2014) *("NJBPU")* (emphasis added).

Indeed, even if the government's field preemption theory survived *Oneok*, and even if FERC had not already rejected the government's assertions about distortion, the government's allusion to possible "distortion" from below-cost bidding is irrelevant. As the government knows, the generators selected under the States' programs,

Petitioners here, bid into the PJM capacity auction on a FERC-approved cost basis, excluding any subsidy provided by the State. The questions presented by the Petitions, and the facts of these cases, involve no issue of below-cost bidding.

I. The Theories Of The Courts Below, And Of The Government, Are Untenable After *Oneok*

A. The Decisions Below Cannot Be Sustained On Their Own Rationale

The Third and Fourth Circuit's rulings were wrong before *Oneok*. *Oneok* confirms their error.

In *Oneok*, the Court reaffirmed the importance of the States' reserved powers within the framework of shared federal-state authority over energy regulation. The FPA, like the NGA, "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok*, 135 S.Ct. at 1599, 1601 (internal quotation marks omitted). Thus, the fact that state laws aimed at a proper state purpose *affect* the federal field cannot be the basis for field preemption; such effects are inevitable. *Nw. Cent.*, 489 U.S. at 512-14; *Oneok*, 135 S. Ct. at 1600-01.

Oneok thus sets forth a straightforward test for field preemption: If a state program "targets" or "aims" within the State's own jurisdictional field, rather than FERC's, it is not field preempted, even if it impacts the federal field. *Oneok*, 135 S. Ct. at 1599-1601. Because the New Jersey and Maryland programs target procurement of new generation capacity, the purchasing decisions of their utilities, and retail rates, they aim squarely at the state side

of the FPA's "'dividing line.'" *Id.* at 1600 (quoting *Nw. Cent.*, 489 U.S. at 514).

Congress expressly preserved *state* authority over "facilities used for the generation of electric energy or over facilities used in local distribution ...." 16 U.S.C. §824(b). In addition to "authority over utility generation," Congress preserved state power over "utility buy-side and demand-side decisions." *New York v. FERC*, 535 U.S. 1, 24 (2002) (internal quotation marks omitted). Congress thus allowed States "to direct the planning and resource decisions of utilities under their jurisdiction." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted). This includes the power to "order utilities to purchase" certain types of generation, and finance that generation through retail rates and otherwise. See *id.* (internal quotation marks omitted).

The Maryland and New Jersey programs aimed at securing and financing construction of new power plants to ensure reliable electricity supplies for the States' citizens. 14-634 Pet. App.-16a. ("LCAPP aimed to encourage power generation companies to construct new power plants...."). Their programs were implemented by directing the States' public utilities to conduct procurements and pay the winning bidders their bid prices, subject to recovery from retail ratepayers. All are matters solidly within the States' authority.

The procurements were also designed not to intrude on the federal field. Successful bidders were required to comply fully with PJM's market rules, including bidding rules, and the PJM "must offer"

rule, *i.e.*, the requirement that all capacity resources bid into the capacity auction.

The government cannot reconcile *Oneok* with these cases. It notes that the States were dissatisfied because the capacity auction had not prompted needed power plant construction, and argues that the States' procurements thereby took "direct aim at the PJM capacity market by attempting to implement their own regulatory frameworks for incentivizing new generation as a direct overlay on the PJM auction." U.S. Br.-17-18.

The government's argument turns the FPA's division of state-federal responsibility upside down. The FPA assigns authority over power plant construction *to States*. 16 U.S.C. §824(b). FERC has, at best, only an indirect role in supporting new generation through rate and market regulation. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009) *("CDPUC")* (authorizing FERC to regulate a futures market to incentivize new generation, but stressing that States remain at liberty to act independently); see *ISO New England, Inc.*, 122 FERC ¶61,144 at PP 14, 16 (2008) ("[S]ection 201 [of the FPA] puts limits on the Commission's jurisdiction as it relates to electrical generating capacity"; "*how* those resources are provided is up to the [load serving entities] and the states" utilizing mechanisms such as "contracts to purchase power") (emphasis in original).

Markets are "less than perfect." *Oneok*, 135 S. Ct. at 1597. And under the FPA, governmental authority to intervene directly to promote new power plant construction when *existing* markets alone have failed to do so, necessarily resides with *States*. See

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States."). Congress denied FERC authority to direct new generation. *CDPUC*, 569 F.3d at 481-82. The government's argument that FERC's *indirect* role in encouraging power plant construction field preempts the States' *direct* role turns the FPA on its head. It also directly contradicts *Oneok*'s holding that so long as the State targets proper state objectives, field preemption cannot be found.

The government's further argument – that these state programs are preempted because they provide incentives beyond those provided by PJM's yearly auction prices – would make sense only if PJM's auction were the exclusive means of selling capacity, or encouraging new power plant construction. But that is simply untrue, and the government does not assert that to be the case. There is not the remotest support for any Congressional or FERC intention to designate that auction as the sole market for capacity sales,[2] or as the sole source of incentives for building new power plants, thereby displacing state governments from exercising their historic power over power plant construction.

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[2] Capacity is routinely sold outside the auction. "Generators, as well as utilities that have purchased capacity from generators under long-term bilateral contracts" – meaning outside the auction – then resell that capacity in the PJM auction. U.S. Br.-5-6.

B. The Government's Price Suppression Theory Of "Field Preemption" Is Untenable Legally; Inconsistent With FERC's Rulings As Regulator; And Rests On Factual Suppositions Contrary To The Record

The government rehashes the position it took as *amicus* in the Third Circuit, arguing that the price *effect* of the state programs (combined with FERC's decision to allow these power plants to offer capacity into the PJM auction) provides a basis for field preemption because of the "suppressive" impact on PJM auction prices. The only difference between the government's Third Circuit argument and here is that, instead of asserting that the States' programs are preempted because they "affect" the PJM auction, the government substitutes the more pejorative verbs "suppress," "distort," "disrupt[]," and "interfere." U.S. Br.-13, 15, 16, 17. In the context of *field* preemption, however, the new words add nothing. They are just another way of saying that the State's initiatives will affect the PJM market by reducing prices in some way.

Words like "distort[ion]," "disrupt[ion]," and "interference" are more commonly used to support a *conflict* preemption argument, rather than a field preemption argument.[3] But the government makes

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[3] As demonstrated in the Reply in No. 14-623, the Fourth Circuit's alternative reliance on "conflict preemption" was makeweight, at best – an echo of mistakes underlying its field preemption rationale. 14-623 Reply-6-10. Any claim of frustration of federal purpose is irreconcilable with the fact that FERC, with full power to protect the PJM auction,

(continued...)

no conflict preemption argument because that would require it to show impairment of a federal purpose. 14-623 Pet.-29-30; 14-623 Reply-9-10; 14-634 Reply-9-10. Any conflict preemption argument is precluded by the fact that (a) FERC has the power to ensure that state initiatives like these have no adverse impact on PJM's auction, and (b) FERC exercised that power here.

Whether under the guise of field or conflict preemption, the government's ostensible concerns about "distort[ion]" or "disrupt[ion]" of the PJM auction are directly contrary to FERC's own rulings as the auction regulator. As the Third Circuit summarized, FERC's rules *prevent* the State programs at issue here "from adversely affecting wholesale capacity rates." *NJBPU*, 744 F.3d at 98.

FERC *held* that its minimum offer price rules, designed to eliminate below-cost bidding, prevented these state programs from "disrupting ... competitive price signals" emanating from the auction. *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145 at PP 3-4 (2011). FERC held that a bidder whose bid clears the auction under those rules is "a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." 135 FERC at P 177. Any contrary approach would "discourage the entry of new capacity that is economic." *Id.* at P 175. Moreover, FERC determined that there was no need for further

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(continued...)
specifically determined that these state procurements posed no threat to that auction.

restrictions because once a bid has cleared the auction, "the resource has demonstrated that it is needed by the market and ... [its] *presence in the market ... does not artificially suppress market prices.*" *Id.* (emphasis added).

As the Third Circuit observed, the effect on auction prices here is an increased supply causing price reduction – the "law of supply-and-demand." 14-634 Pet. App.-29a. There is a difference between price "suppression" from added supply, which FERC obviously does not find objectionable, and "artificial price suppression," from below cost-bidding, which FERC ensured would not occur here under its minimum offer price rules.

Although Petitioners in this case submitted cost-based bids into the auction, the government nonetheless alludes to potential price suppression from below-cost bidding. It observes that FERC's minimum offer price rules, which generally bar below-cost bidding, could, *in theory*, allow a bidder to bid a "minimum-offer *default price* – even if the generator's actual costs are higher than the default price." U.S. Br.-16 (emphasis added). None of this happened here, of course, and that hypothetical argument is, at its core, a collateral attack on FERC's decision to allow that theoretical – but, as a practical matter, unlikely[4] – possibility to exist under its rules.

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[4] It is unlikely because if the "default price" is set high, an offer at that default price (a) will not clear (and thus does not affect) the auction price, and (b) is not likely to be below any offeror's costs.

The government does *not* suggest that a "default price," or "below-cost" bidding, had any role in these cases. Petitioners, the winning generators under the New Jersey and Maryland programs, did not bid either a "default" or "below-cost" price. To the contrary, in accordance with FERC's minimum offer price rules, they offered their capacity into the auction at thoroughly documented, cost-based prices, irrespective of any subsidy.[5] PJM reviewed the bids to ensure that they were not below cost, and the final auction price was approved by FERC. There was no below-cost bidding. Thus, the government's allusion to below-cost bidding potentially affecting prices is legally irrelevant as a matter of field preemption, inconsistent with FERC's determination to allow bids that comply with its minimum offer price rules, and factually irrelevant to the questions actually presented by the Petitions.

II. The Government's Attempt To Downplay The Impact Of These Cases Falls Flat

The decisions below nullify two States' efforts to meet their citizens' electricity needs by investing in three major natural gas power plants, each costing more than a half-billion dollars. As reflected in the briefs of many *amici*, the decisions by their terms undermine a basic method by which States finance major power plant and alternative energy projects. And the pall of uncertainty created by those decisions has already been felt in the suspension of

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[5] See, *e.g.*, 14-623 Pet. App.-94a (explaining that CPV's bid was cost-justified).

projects supported by long-term contracts even in other Circuits.[6] No prudent investor or lender will make billion dollar investments in needed infrastructure projects whose revenues are subject to being stripped away under a preemption theory.

The government insists that the displacement of state authority wrought by these decisions will ultimately be narrow because the opinions declare themselves narrow. The government suggests that other state subsidies, like tax breaks, or tax-supported bonds, might survive judicial review. But by off-setting costs, all such subsidies would have the same "suppressive" effect on prices.

Reliable, long-term revenue streams, backed by local ratepayers, have always been a key incentive to power plant investment.[7] The decisions below threaten the ability of the States to ensure those revenue streams, and thus to support needed power plant construction. Until the decisions below, the mechanism declared unlawful here had proven effective in encouraging new power plants to be built, and had done so in a manner that is

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[6] For example, New York recently approved a long-term contract designed to provide the revenue needed to keep a needed coal-operated plant from being mothballed. In the face of a preemption challenge, the plant operator suspended development. See "NRG To Close Huntley Coal-Fired Plant," *Megawatt Daily* at 13 (Aug. 26, 2015) ("We can't continue to invest in the plant under such massive uncertainty.").

[7] More than 97% of all power plant construction is supported by long-term ratepayer commitments. See American Public Power Association, *Power Plants Are Not Built on Spec*—2014 Update at 1-2 and Table 1 (2014), http://goo.gl/t62QuS.

economically efficient. States and their retail ratepayers pay precisely what is required to get needed new generation built, namely, the difference between the revenues needed to support private investment in a new power plant, and the revenue the plant obtains by selling capacity in the interstate market. Other forms of subsidy, fashioned without reference to revenues earned by selling capacity in the interstate market – such as tax breaks – may be too great (wasting taxpayer money) or too small (failing to encourage development). The decisions below improperly divest the States of their ability to support important projects, and do so in a manner fundamentally inconsistent with the States' responsibilities under the FPA.

CONCLUSION

The Petitions should be granted.

Respectfully submitted.

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